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IN THE

Supreme Court of the United States

October Term, 1970

No. 1418

FRANK JOSEPH SANDOVAL and JAMES VIGIL,
Petitioners and Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, THE PEOPLE OF LOS ANGELES, a Municipal Corporation, ROGER ARNEBERGH, City Attorney thereof, EDWARD DAVIS, Chief of Police thereof, COLLIER McDERMON, THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT AND THE HON. JUDGE DAVID J. ABERSON,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth District.

In support of petition for certiorari, the following is submitted:

a. The official report of the opinion delivered by the 9th U.S. Circuit Court of Appeals below appears in 434 F. 2d 635.
The opinion of said Court is set forth in Appendix I. Petition for rehearing was denied Feb. 5, 1971, without an opinion.

b. The federal Court of First Instance rendered no written opinion.

Jurisdictional Grounds.

1. The entry of the date of judgment sought to be reviewed was November 20, 1970.
2. The denial of petition for rehearing by the 9th Circuit Court of Appeals is dated February 5, 1971.
3. Invocation of Jurisdiction to review the judgment by Writ of Certiorari is made pursuant to 28 U.S.C. Section 1447 (d), Rule 22 (2) and 28 U.S.C. 1254 (1).

c. Question presented for review:
Upon a request to enjoin pending criminal prosecution by State Officials under the Civil Rights Act, for violations of federally protected civil rights, does due process of law require the District Court to consider the facts in support of probable cause, or may the District Court escape this duty to hear and abstain from adjudging on asserted "lack of jurisdiction".

Jurisdictional Statutory Authorities.

The statutory provisions which gave the District Court jurisdiction, and called to its attention [Cl. Tr. pp. 111-113], are the following:

1. 28 U.S.C. 1443 (1) (2), 62 Stat. 938 (1964)
2. 28 U.S.C. 1343 (3) (4) authorized by 42 U.S.C.
Sections 1981, 2000 C-8,
78 Stat. 249 (1964), and 2000-D,
78 Stat. 252 (1964)
3. 28 U.S.C. 1441, 62 Stat. 937 (1948)
4. 42 U.S.C. 1981, 16 Stat. 144 (1870)
5. 42 U.S.C. 1983, 17 Stat. 13 (1871)

6. Fifth Amendment U.S. Constitution (Due Process Clause)
7. Fourteenth Amendment U.S. Constitution (Equal Protection).

The Circuit Court conceded in the case at bar in its opinion that it was:

> "Clear that the rights . . . spring . . . from the broad protection of the First and Fourteenth Amendments".

Important Question of Law.

THE IMPORTANT QUESTION OF LAW IN THE FIELD OF CIVIL RIGHTS PERTAINS TO THE SCOPE OF THE DISCRETION OF DISTRICT COURTS IN REFUSING TO ASSUME JURISDICTION ON MATTERS INVOLVING ALLEGED CIVIL RIGHTS VIOLATIONS AND TO ABSTAIN FROM DECIDING THE MERITS OF A CHALLENGE THAT A STATE LAW AS APPLIED TO THE FACTS, VIOLATES THE FEDERAL CONSTITUTION.

d. Text of Laws appear hereunder at Appendix II.

e. CONCISE STATEMENT OF FACTS.

Messrs. Sandoval and Vigil were arrested and incarcerated for alleged violation of Section 403 of the California Penal Code, (Disturbing a lawful public assembly), and section 415 thereof, (Disturbing the peace). [Cl. Tr. pp. 89-91]. Messrs. Sandoval and Vigil removed the matter to the Federal Court of First Instance under 28 U.S.C. 1443 (1) (2) and additionally set forth other jurisdictional statutes, seeking injunction.

1. Said Penal Code sections above were challenged by Messrs. Sandoval and Vigil for Impermissible (overbreadth), yet the District Court abstained from passing thereon.

The application of the said State laws to the facts at bar required no construction so that men of common intelligence would differ as to the same.

2. A special showing of the need for an injunction against criminal proceedings was also made, yet the District Court dismissed rather than retain jurisdiction.

3. A showing was also made of the need for redressing and deprivation under color of State law, of rights secured by the Constitution, as well as Civil Rights yet the District Court stated that it lacked jurisdiction of the action because the rights asserted could also be adjudicated ni the State forum.

4. It is conceded that the arrest of Messrs. Sandoval and Vigil was made by a *State Officer*, to wit: an employee of the California Department of Education, while Messrs. Sandoval and Vigil were participating in matters pertaining to equal racial Civil Rights violations of Mexican Americans in public education *by said California Department of Education.*

5. It is not denied that the locus and forum of the Civil Rights activities in question at the time of arrest were provided by the California Department of Education and that Messrs. Sandoval and Vigil were present at said forum at the request of said State Department, as invitees.

6. There was statewide concern by the Mexican American ethnic population because the special educational testing procedures imposed pursuant to State custom and law, (California Education Code, Section

12820 *et seq.*, 6902 *et seq.*, Stats. 1959, California Education Code), Appendix II-i, hereunder by the California State Department of Education, constituted in practice, hostile discriminatory State legislation against the Mexican ethnic minority (See H.E.W. policy memorandum pointing out racial discriminatory practices Appendix II-j.)

The State of California imposed testing procedures, which illegaly relegated the children of Mexican Americans families into classes for the educable mentally retarded (EMR), in the California public school system, [See Spanish Speaking Mentally Retarded, Ex. "C", Cl. Tr. pp. 79-88] to become drop-outs. Said testing resulted in segregation. Said curricular separation excluded and segregated them from participating in meaningful educational programs all of which accomplished an unlawful end in the violation of their equal civil rights in the field of education.

7. The California State Department of Education had called a conference pursuant to which Messrs. Sandoval and Vigil, who are of Mexican American ethnic origin, attended. This was an activity receiving Federal financial assistance. The sponsor of said activity was an instrumentality of the State of California, to wit: the principal and employer of Collier McDermon, who made the arrest on behalf of said principal, the California State Department of Education.

Said Federally assisted conference concerned the responsibilities of California State School Districts, which by State law, customs and usages, had failed and omitted to provide equal educational opportunity to national minority group children deficient in English language skills, the Mexican American ethnic group [Cl. Tr. Ex. "A", pp. 28-44].

The almost exclusive use of the English language in all facets of the California public school system, because English is a "foreign" language to many Mexican American pupils, required a change for equality of curriculum.

8. The above issues, of statewide concern, were presented at said Conference in the form of exhibits, speeches, and a series of workshops, inclusive of a banquet which was held on April 24, 1969, the night of the arrests. Wide discussion was solicited and request "to speak up" was encouraged by the California Department of Education, without "Robert's Rules of Order" [Cl. Tr. Ex. "A", pp. 28-44].

The importance of the issues before the Conference was perhaps best demonstrated by the presence of many influential State Government officials and educators. Between 500 and 600 persons attended the banquet meeting.

9. In reliance on the stated purposes of the California Department of Education for said Conference, and the serious issues of racial inequality in the public schools of California often raised during the first two days of the Conference, Messrs. Sandoval and Vigil, and others present, severally exercised their right of protest, sought redress of grievances and equal racial rights under the 14th Amendment, by clapping in unison, and thereby interrupted the speaker, whom it was generally believed was not addressing himself to the issues but on collateral matters not encompassed within the objects and purposes of the conference.

At no time were the petitioners ordered to desist from their orderly protest and petition, nor were they ordered to leave or disperse.

The entire incident lasted less than two minutes.

1. There was no violence.
2. There was no intimidation.
3. There were no threats.
4. There was no hostility.
5. There was no cursing.
6. There was no traffic problem created.
7. There were no physical altercations or resistance to arrest.
8. There was no disobedience to law enforcement officers.
9. The safety of the speaker was at no time threatened.
10. There was no offensive conduct.
11. There was no vulgar, profane or indecent language used.

While petitioning appellants were thus petitioning the Governor of the State of California, who was the speaker, Collier McDermon, a non-Mexican American, Assistant Superintendent of Public Instruction of the State of California, declared that he was placing other individuals and petitioners, who were all Mexican Americans, under a citizen's arrest [Cl. Tr. p. 93, *infra*]. Upon this declaration, police officers of the City of Los Angeles took the non-resisting arrestees, all Mexican Americans, into custody and transported them to jail for and on behalf of the principal of said Collier McDermon.

Messrs. Sandoval and Vigil were charged with violation of 403 and 415 (*supra*), of the California Penal Code, and according to the arrest request, all arrestees, inclusive of said petitioning appellants, were there-

upon prosecuted as criminals in the State Municipal Court at the behest of said Collier McDermon [Cl. Tr. p. 93 *infra*].

Amplification of Reasons for Allowance of Writ.

In the *City of Greenwood v. Peacock* and the *Georgia v. Rachel* cases decided the same day, in the year 1966, 384 U.S. 808 and 384 U.S. 780, it was noted that since 1789 the jurisdiction of Federal Courts where federal rights are in issue, has been steadily expanded. *Both* opinions related that removal jurisdiction has grown as indispensable to the effective enforcement of guarantees against local action in criminal administration, and more recently in the field of civil rights.

At the bottom of page 787 of the opinion, said Supreme Court decision refers to a remark by Senator Dodd, who spoke for the appealability of remand orders, as follows:

> "Some have thought that it would be better for Congress to specify directly the kinds of cases which it thinks sought to be removable. . . . It would be extremely difficult to specify with precision the kinds of cases which ought to be removable under Section 1443. This is true because of the many and varied circumstances which can and do arise in civil rights matters. Accordingly, it seems advisable to allow the courts to deal case by case with situations as they arise and to fashion the remedy so as to harmonize it with the other statutory remedies made available for denials of equal civil rights. (110 Cong. Rec. 6956)".

There is very little difference in the right to obtain equal puplic services in a place of public accommodation, and the right to obtain equal public services in

a place providing public education. In the *Georgia v. Rachel* case (*supra*) the Court said that by its use of the words "unusual case" it did not intend to restrict in any manner whatever other situations *in pari materia*.

Appellants were specially invited and admission paid by them to make their demands known on the specific educational problems pertaining to this ethnic group and to which Appellants formed a part. The exceptional rule of protection defined by the majority in said *Peacock* case cited by Respondents, make the case at bar more exceptional, unusual, and more susceptible to removal because in the case at bar Appellants were peaceful and within the context of civil rights. They were arrested perfunctorily without having first been asked to desist or disperse, according to the supporting affidavits, and criminally prosecuted therefor.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MANUEL RUIZ,
Counsel for Petitioner.

APPENDIX I.

Opinion of the United States Court of Appeal for the Ninth Circuit.

For the Ninth Circuit United States Court of Appeals.

No. 25,781.

[November 20, 1970]

Appeal from the United States District Court for the Central District of California

Before: BARNES, HUFSTEDLER, and TRASK, Circuit Judges.

PER CURIAM:

Appellants, Frank Joseph Sandoval and James Vigil seek reversal of an order of the district court denying their petition to remove a state criminal prosecution against them pursuant to 28 U.S.C. § 1443.

Appellants were guests at a formal banquet that was part of a program sponsored by the California Department of Education to discuss the problems of Mexican-American education. Governor Reagan of California was the featured speaker; his address displeased appellants and several others present. To protest the speech, this group rose and began a rhythmic clapping, eventually forcing the governor prematurely to terminate his address. A citizen's arrest of appellants was made, and complaints were filed alleging that appellants had violated California Penal Code §§ 403 (disturbing a public assembly) and 415 (disturbing the peace).

Appellants petitioned the district court, seeking removal of the state prosecution under 28 U.S.C. § 1443. Appellee moved to remand the case to the state court pursuant to 28 U.S.C. § 1447, and the court granted the motion. This appeal followed.

Section 1443 gives a right of removal to, among others, certain petitioners who claim federally secured rights as a defense to a state prosecution.[1] The Supreme Court, however, has given section 1443 a restrictive interpretation. In two related cases in 1966, *Georgia v. Rachel,* 384 U.S. 780, and *Greenwood v. Peacock,* 384 U.S. 808, the Court set out the narrow parameters of this right. All petitions for removal must satisfy two criteria: First, the petitioners must assert, as a defense to the prosecution, rights that are given to them by explicit statutory enactment protecting equal racial civil rights. (*Georgia v. Rachel, supra* at 788-92; *Greenwood v. Peacock, supra* at 824-27.) Second, petitioners must assert that the state courts will not enforce that right, and that allegation must be supported by reference to a state statute or a constitutional provision that purports to command the state courts to ignore the federal rights. Bad experiences with the particular court in question will not suffice. (*Georgia v. Rachel, supra* at 794-804; *Greenwood v. Peacock, supra* at 827-28.)

Appellants have not met either of these criteria. Despite their ingenious effort to attack the state prosecu-

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[1]The full text of § 1443 is as follows:

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusieng to do any act on the ground that it would be inconsistent with such law."

tion in terms of the Civil Rights Act of 1964, it is clear that the rights that they assert spring, not from specific statutory grants, but from the broad protections of the First and Fourteenth Amendments. Such rights are not within the coverage of section 1443. (*Georgia v. Rachel, supra,* at 788-92; *Greenwood v. Peacock, supra* at 825.) Nor can appellants point to any enactment of California state law that supports the inference that what rights they have will not be heard fully and fairly in the courts of that state.

The order is AFFIRMED.

APPENDIX II.

Laws and Statutes.

Title 28 U.S.C. Section 1443. Civil rights cases.

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. June 25, 1948, c. 646, 62 Stat. 938.

Title 28 U.S.C. section 1343 Civil rights and elective franchise:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Title 42 U.S.C. section 2000c-8 Personal suits for relief against discrimination in public education:

Nothing in this subchapter shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education.

Title 42 U.S.C. section 2000d SUBCHAPTER v. FEDERALLY ASSISTED PROGRAMS:

PROHIBITION AGAINST EXCLUSION FROM PARTICIPATION IN, DENIAL OF BENEFITS OF, AND DISCRIMINATION UNDER FEDERALLY ASSISTED PROGRAMS ON GROUND OF RACE, COLOR, OR NATIONAL ORIGIN

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation, in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pub. L. 88-352, Title VI, & 601, July 2, 1964, 78 Stat. 252.

Title 28 U.S.C. section 1441 Actions removable generally:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Title 42 U.S.C. section 1981 Equal rights under the law:

All persons within the jurisdiction of the United States shall have the same right in every State and Ter-

ritory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit ot all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. R.S. 1977. Derivation. Act May 31, 1870, c. 114. & 16, 16 Stat. 144.

Title 42 U.S.C section 1983 Civil action for deprivation of rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

R.S. & 1979.

CONSTITUTION OF THE UNITED STATES

Amendment V

Criminal Proceedings and Condemnation of Property

(Section 1.) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or prop-

erty, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES
Amendment XIV

(Section 1.) . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Education Code.
Chapter 9

Education of Mentally Retarded Minors

§ *6901. "Mentally retarded minors" defined*

"Mentally retarded minors" means all minors who because of retarded intellectual development as determined by individual psychological examination are incapable of being educated efficiently and profitably through ordinary classroom instruction.

§ *6902. Provisions for education and mentally retarded minors expected to benefit from special facilities*

The education of mentally retarded minors who are of compulsory school age and who may be expected to benefit from special educational facilities designed to make them economically useful and socially adjusted shall be provided for in the manner set forth in Sections 6901 to 6913, inclusive, and in Sections 8951 to 8956, inclusive. Such special education may be provided mentally retarded minors below compulsory school age who are between five years nine months and eight

years of age and those above compulsory school age and less than 21 years of age.

§ *6903. Provisions for education of mentally retarded minors not within provisions of Section 6902*

The education of mentally retarded minors who do not come within the provisions of Section 6902, who are 8 or more, and less than 18 years of age and who may be expected to benefit from special educational facilities designed to educate and train them to further their individual acceptance, social adjustment, and economic usefulness in their homes and within a sheltered environment, shall be provided for in the manner set forth in Sections 6901 to 6913, inclusive, and in Sections 8951 to 8956, inclusive. The education of such mentally retarded minors who are five or more and less than eight years of age may be provided for in the manner set forth in Sections 6901 to 6913, inclusive, and in Sections 8951 to 8956, inclusive.

Any such minor who becomes 18 years of age while in attendance upon a special training school or class shall be permitted to continue to attend thereon for the remainder of the time such school or class is maintained during the then current school year.

Notwithstanding other provisions of this section any such minor who is participating regularly in an approved occupational training program in the manner set forth in Sections 6931 and 6932 may be permitted by the governing board of the district or county superintendent of schools, as the case may be, maintaining such training program to continue thereon until his 21st birthday.

§ *12820. Definitions*

As used in this chapter:

(a) "Achievement tests" means any standardized test which measures or attempts to measure the level of performance which a pupil has attained in one or more courses of study.

(b) "Physical performance test" means any test which measures or attempts to measure the physical fitness of a pupil.

(c) "Intelligence test" means any standardized test which measures or attempts to measure the scholastic aptitude of a pupil.

(d) "Testing program" means the systematic achievement, physical fitness, and intelligence testing of any or all pupils in grade 6 or 8, whichever is the last grade in the particular elementary school within the school district, and grade 12 in any or all schools within a school district.

(e) "Basic skills courses" means those subjects which involve, among other skills, memorization and mastery of specific functions, including, but not limited to, reading, spelling, basic mathematics, and grammar.

(f) "Content courses" means those subjects which require the integration of factual matter, logical analysis, the solution by the student of posed problems, and the ability to communicate ideas, including, but not limited to, literature, history, advanced mathematics, and science.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

May 25, 1970

MEMORANDUM

TO : School Districts With More Than Five Percent National Origin-Minority Group Children

FROM : J. Stanley Pottinger
Director, Office for Civil Rights

SUBJECT : Identification of Discrimination and Denial of Services on the Basis of National Origin

Title VI of the Civil Rights Act of 1964, and the Departmental Regulation (45 CFR Part 80) promulgated thereunder, require that there be no discrimination on the basis of race, color or national origin in the operation of any federally assisted programs.

Title VI compliance reviews conducted in school districts with large Spanish-surnamed student populations by the Office for Civil Rights have revealed a number of common practices which have the effect of denying equality of educational opportunity to Spanish-surnamed pupils. Similar practices which have the effect of discrimination on the basis of national origin exist in other locations with respect to disadvantaged pupils from other national origin-minority groups, for example, Chinese or Portugese.

The purpose of this memorandum is to clarify D/HEW policy on issues concerning the responsibility of school districts to provide equal educational opportunity to national origin-minority group children deficient in English language skills. The following are some of the major areas of concern that relate to compliance with Title VI:

(1) Where inability to speak and understand the English

language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

(2) School districts must not assign national origin-minority group students to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills; nor may school districts deny national origin-minority group children access to college preparatory courses on a basis directly related to the failure of the school system to inculcate English language skills.

(3) Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational dead-end or permanent track.

(4) School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.

School districts should examine current practices which exist in their districts in order to assess compliance with the matters set forth in this memorandum. A school district which determines that compliance problems currently exist in that district should immediately communicate in writing with the Office for Civil Rights and indicate what steps are being taken to remedy the situation. Where compliance questions arise as to the sufficiency of programs designed to meet the language skill needs of national origin-minority group children already operating in a particular area, full information regarding such programs should be provided. In the area of special language assistance, the scope of the program and the process for identifying need and the extent to which the need is fulfilled should be set forth.

School districts which receive this memorandum will be contacted shortly regarding the availability of technical assistance and will be provided with any additional information that may be needed to assist districts in achieving compliance with the law and equal educational opportunity for all children. Effective as of this date the aforementioned areas of concern will be regarded by regional Office for Civil Rights personnel as a part of their compliance responsibilities.